**Wine and Liquor Store Employees Union, Local 122, affiliated with Distillery, Rectifying Wine & Allied Workers International Union of America, AFL-CIO *and* Harvey Entin, d/b/a Oz Liquor Co.** Case 2-CB-8849

May 27, 1982

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 19, 1981, by Harvey Entin, d/b/a Oz Liquor Co., herein called Entin, and duly served on Wine and Liquor Store Employees Union, Local 122, affiliated with Distillery, Rectifying Wine & Allied Workers International Union of America, AFL-CIO, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint on June 30, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. On September 9, 1981, the Regional Director for Region 2 issued an order amending the complaint which was served on all parties to this proceeding.

With respect to the unfair labor practices, the amended complaint alleges that Respondent entered into a collective-bargaining agreement with Entin containing an invalid union-security clause, and tried to enforce that invalid union-security clause by, *inter alia*, commencing an arbitration proceeding against Entin, requiring Entin to discharge certain of his employees, entering into an agreement with Entin in which Entin agreed to discharge those employees, and attempting to confirm that agreement in the supreme court of the State of New York. On July 22, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and requesting that the complaint be dismissed.[1]

On October 27, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and issuance of a Decision and Order. Subsequently, on October 30, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent admitted, *inter alia*, that on or about November 22, 1980, Respondent and Entin entered into, and have since then maintained in effect, a collective-bargaining agreement covering certain of Entin's employees and that the agreement provides, in pertinent part:

> Whenever the Employer shall find it necessary to replace or to employ additional employees, he shall be required first to notify the Union to supply such employees as needed. If the Union shall be unable, within twenty-four (24) hours after request therefor, to furnish the Employer with a member or members in good standing, then and in that event the Employer shall be permitted to employ a person of his own choosing provided, however, that such person makes application to and be accepted as a member of the union by a duly authorized officer of the Union.
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> The Employer agrees that he will employ none other than employees in good standing in the Union during the term of this Agreement. The Union shall be the sole judge of the good standing of its members and, upon notice by the Union to the Employer in writing that any employee is not a member in good standing in the Union, such employee shall forthwith be discharged.

Respondent also admitted that in or about October 1980 it commenced an arbitration proceeding against Entin in which it attempted, pursuant to the provision of the collective-bargaining agreement described above, to require Entin to discharge certain of his employees who were not members in good standing with Respondent.[2] It further ad-

[1] Par. 6 of the complaint alleges that Respondent violated Sec. 8(b)(1)(A) and (2) by initiating arbitration proceedings in or about October 1980, and by settling the matter on or about October 9, 1980. Although Entin did not file the charge giving rise to this proceeding until May 19, 1981, Respondent did not attempt to raise Sec. 10(b) of the Act as a bar to this allegation of the complaint. We note that the Board considers Sec. 10(b) a statute of limitations and therefore waived if it is not timely raised. *Vitronic Division of Penn Corporation*, 239 NLRB 45 (1978). We find any such defense waived in the instant case.

[2] The General Counsel alleged, and Respondent admitted, that Respondent and Entin entered into a collective-bargaining agreement on

*Continued*

mitted that on October 9, 1980, it entered into an agreement with Entin settling the matter set for arbitration and that in that Entin agreed to discharge certain of his employees who were not in good standing with Respondent. Respondent denied the allegation of the amended complaint that on or about April 2, 1981, it attempted to confirm, in the supreme court of the State of New York, this settlement agreement.

We find the contract clause quoted above unlawful for several reasons. Although a union may maintain a contract clause providing for an exclusive hiring hall, in making referrals a union may not discriminate on the basis of union membership. Here, the agreement provides for an exclusive hiring hall in that Entin must notify Respondent of his need for new employees and cannot look to any other source for employees for 24 hours. As to whether referrals are limited to members, the clause provides that only if Respondent is unable to refer a member or members in good standing is Entin free to look elsewhere. Clearly, the reference to referrals in terms of membership in Respondent strongly implies, if it does not require, that Respondent will refer only members. In this regard, we also note that the clause anticipates that Respondent will refer only members since it provides that Entin's obligation to hire Respondent's referrals is limited to those who are members. Furthermore, everything else in the clause is cloaked in terms of membership in Respondent. Indeed, the clause requires that, in the event the hiring hall cannot furnish employees, Entin will hire from outside sources only those who make application to and are accepted as members by Respondent. Consequently, it appears that any employees not referred by Respondent must, before hire, be cleared by the latter as new members as a condition of their obtaining employment. This aspect of the clause, therefore, also supports the inference that membership is a prerequisite for referral. It would be anomalous to conclude that Respondent will only approve employees for hire who become members in instances of nonreferrals, but that it will place no such condition on employees it refers. Thus, while technically the clause may be read so as not to preclude the possibility that Respondent will refer nonmembers (which Entin would then be free to reject), we believe the only reasonable reading of the clause is that the parties intended Respondent to refer only members.[3] This limitation of referral to members violates the well-established requirement that through an exclusive hiring hall arrangement a union must service prospective employees in a fair and equitable manner irrespective of union membership. *Hickey Cab Company*, 88 NLRB 327 (1950). Accordingly, Respondent's maintenance of this exclusive hiring hall clause is in violation of the Act.

Further, although the Act permits a union to maintain a contract clause requiring membership in the union as a condition of employment, to comply with the Act a union-security clause may only compel an employee to pay initiation fees and union dues uniformly required. *N.L.R.B.* v. *General Motors Corporation*, 373 U.S. 734 (1963). The clause at issue here requires employees to maintain "good standing in the union" as a condition of employment. It also provides that Respondent is the sole judge of its members' good standing. It does not equate payment of initiation fees and union dues with good standing. Thus, by these terms, Respondent could compel employees to do more than satisfy minimal financial obligations to the Union. For example, it could insist that employees attend meetings, take an oath, or pay additional assessments; failure to do so would jeopardize employees' job tenure. Thus, if Respondent determined that an employee was not in good standing, for whatever reason, it could demand Entin to discharge him. Entin could not oppose the demand without violating the contract. Because, by its terms, the union-security clause gives Respondent the right to insist that employees do more than pay initiation fees and periodic union dues uniformly required as a condition for acquiring or retaining union membership it is unlawful.

The contract also provides for an unlawful closed shop. It requires that an employee or employees chosen by the Employer (after Respondent is unable to refer a member or members within 24 hours) "make application and be accepted as a member of the Union by a duly authorized officer of the Union." An agreement limiting employment to union members is unlawful. *J. S. Brown-E. F.*

November 22, 1980, containing the union-security clause at issue. The General Counsel further alleged, and Respondent admitted, that Respondent began arbitration proceedings to enforce that union-security clause in or about October 1980. On the surface it would appear that Respondent attempted to enforce the collective-bargaining agreement a month before the parties reached agreement on it. However, in view of Respondent's admission we deduce that prior to the collective-bargaining agreement entered into on or about November 22, 1980, Respondent and Entin had a previous agreement that contained a union-security clause identical to the one quoted in the text. Respondent apparently began arbitration proceedings to enforce the clause in the predecessor collective-bargaining agreement. In any event, as Respondent admitted that it commenced an arbitration proceeding in which it sought to require Entin to discharge employees pursuant to the cited union-security clause, we will rule on the facts as admitted.

[3] Even assuming *arguendo* that the parties intended that Respondent refer both members and nonmembers, the clause would still be discriminatory and therefore unlawful since it permits Entin to reject nonmembers while compelling him to accept members, thereby giving an unfair advantage to members.

*Olds Plumbing & Heating Corporation*, 115 NLRB 594, 595 (1956). This provision, conditioning a new employee's job on Respondent's willingness to accept the employee as a union member, is therefore unlawful.

Similarly, failure to grant employees the statutory grace period of 30 days in which to become a union member is unlawful. Under the 8(a)(3) proviso, a union-security clause must give employees at least 30 days to become a union member. However, this contract does not specify that the employee has 30 days in which to establish a relationship with his bargaining representative. Thus, this contract exceeds the permissive bounds of a union-security clause. *Argo Steel Construction Company*, 122 NLRB 1077, 1092 (1959).

Any attempt to enforce the unlawful clauses is likewise unlawful.[4] Here, Respondent sought enforcement of the clauses through an arbitration proceeding commenced in October 1980 and a settlement thereof with Entin in which the latter agreed to discharge employees not in good standing. Because the union-security clause is flawed, Respondent may not try to compel Entin by these or any other means to discharge his employees on the basis of the contract clauses.

Accordingly, we find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by maintaining with Entin contract clauses which provide for an exclusive discriminatory hiring hall, allow Respondent to demand more of employees than the payment of initiation fees and dues, provide for a closed shop, and require employees to seek union membership irrespective of the 30-day statutory grace period. We also find that Respondent violated these sections of the Act by attempting to obtain the discharge of Entin's employees pursuant to the union-security clause. Therefore, we grant the Motion for Summary Judgment with respect to these matters.

However, with respect to the allegation that Respondent attempted to enforce in state court the agreement settling the matter set for arbitration, we find that summary judgment is not warranted. The General Counsel attached to his pleadings a copy of a New York supreme court decision issued in an action initiated by Entin, against Respondent, to stay arbitration. The General Counsel asserts that the court's mention of Respondent's April 2, 1981, notice of cross-motion conclusively shows that Respondent sought to confirm the referred-to arbitration award in state court. However, the court order on Entin's motion to stay arbitration does not specify whether the arbitration referred to concerns *this* attempt by Respondent to enforce the union-security clause. To the contrary, it makes mention of, *inter alia*, an arbitration award dated November 26, 1980, the parties' collective-bargaining agreements dated January 1, 1977, and January 1, 1980, and notices of intention to arbitrate dated August 11, 1980, and December 1, 1980, but makes no mention of the October 9, 1980, settlement agreement. Without clear evidence that the state court decision cited by the General Counsel concerns the particular matter in this complaint, that is, the matter set for arbitration and then settled by the parties, and in light of Respondent's denial of the pertinent allegation, we find that summary judgment is not warranted on this issue. However, a determination that Respondent violated the Act as alleged in this portion of the complaint would not materially affect the remedy, *infra*. Therefore, we find it would serve no purpose to remand the case for hearing solely on that allegation. Accordingly, we shall dismiss that portion of the amended complaint alleging that Respondent unlawfully attempted to enforce in state court the October 9, 1980, settlement agreement.[5]

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE EMPLOYER

Harvey Entin d/b/a Oz Liquor Co., herein called Entin, a sole proprietorship, with an office and place of business in New York, New York, is engaged in the retail sale of wine, liquors, and related products. During the past 12 months, a representative period, Entin, in the course and conduct of his business operations derived gross revenues in excess of $500,000, and purchased and received at his facility products, goods, and materials valued in excess of $50,000 from other enterprises located within the State of New York, each of which enterprises received the products, goods, and materials directly from points outside the United States.

We find, on the basis of the foregoing, that Entin is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

[4] *Local 1474-1 Pipe Coverers, International Longshoremen's Association (J. Q. H. Insulating Co., Inc.)*, 147 NLRB 90, 99-100 (1964). See also *Television Wisconsin, Inc.*, 224 NLRB 722, 778-780 (1976); *True Temper Corp.*, 217 NLRB 1120 (1975).

[5] The New York court order is evidence of Respondent's continuing efforts to obtain the discharge of Entin's employees based on the unlawful union-security clause.

### II. THE LABOR ORGANIZATION INVOLVED

Wine and Liquor Store Employees Union, Local 122, affiliated with Distillery, Rectifying Wine & Allied Workers International Union of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

1. On or about November 22, 1980, Entin and Respondent entered into and maintained a collective-bargaining agreement covering certain of Entin's employees. That agreement provides, in pertinent part:

> Whenever the Employer shall find it necessary to replace or to employ additional employees, he shall be required first to notify the Union to supply such employees as needed. If the Union shall be unable, within twenty-four (24) hours after request therefor, to furnish the Employer with a member or members in good standing, then and in that event the Employer shall be permitted to employ a person of his own choosing provided, however, that such person makes application to and be accepted as a member of the union by a duly authorized officer of the Union.
>
> The Employer agrees that he will employ none other than employees in good standing in the Union during the term of this Agreement. The Union shall be the sole judge of the good standing of its members and, upon notice by the Union to the Employer in writing that any employee is not a member in good standing in the Union, such employee shall forthwith be discharged.

2. On or about October 1, 1980, Respondent commenced an arbitration proceeding against Entin in which it attempted, pursuant to the collective-bargaining provisions described above, to require Entin to discharge certain of its employees who were not members in good standing with Respondent.

3. Respondent entered into an agreement with Entin settling the matter set for arbitration and in that agreement Entin agreed to discharge certain of its employees who were not in good standing with Respondent.

By each of the acts described in paragraphs 1, 2, and 3 above, Respondent has restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

By each of the acts described in paragraphs 1, 2, and 3 above, Respondent has attempted to cause, and is attempting to cause, an employer to discriminate against his employees in violation of Section 8(a)(3) of the Act, and has engaged in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The acts and conduct of Respondent described in section III, above, occurring in connection with the operations of Entin, described in section, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, we shall order that it cease and desist therefrom. In particular, it shall cease and desist from maintaining and enforcing the hiring hall and union-security clauses of the parties' collective-bargaining agreement. Respondent shall post at its office, and the office of Entin, if Entin is willing, the attached notice marked "Appendix."

### CONCLUSIONS OF LAW

1. Harvey Entin, d/b/a Oz Liquor Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Wine and Liquor Store Employees Union, Local 122, affiliated with Distillery, Rectifying & Allied Workers International Union of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent by: (a) entering into and maintaining with Entin a collective-bargaining agreement that provides:

> Whenever the Employer shall find it necessary to replace or to employ additional employees, he shall be required first to notify the Union to supply such employees as needed. If the Union shall be unable, within twenty-four (24) hours after request therefor, to furnish the Employer with a member or members in good standing, then and in that event the Employer shall be permitted to employ a person of his own choosing provided, however, that such person makes application to and be accepted as a member of the union by a duly authorized officer of the Union.

> The Employer agrees that he will employ none other than employees in good standing in the Union during the term of this Agreement. The Union shall be the sole judge of the good standing of its members and, upon notice by the Union to the Employer in writing that any employee is not a member in good standing in the Union, such employee shall forthwith be discharged;

(b) commencing an arbitration proceeding against Entin in which it attempted to require Entin to discharge certain of his employees who were not members in good standing with Respondent; and (c) entering into an agreement with Entin settling the matter set for arbitration which required Entin to discharge employees not in good standing with Respondent, has restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, and has attempted to cause, and is attempting to cause, an employer to discriminate against his employees in violation of Section 8(a)(3) of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Wine and Liquor Store Employees Union, Local 122, affiliated with Distillery, Rectifying Wine & Allied Workers International Union of America, AFL-CIO, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Harvey Entin, d/b/a Oz Liquor Co., to discriminate against his employees on the basis of their membership with Respondent.[6]

(b) Maintaining or giving effect to the hiring hall and union-security clauses of the collective-bargaining agreement with Entin.

(c) Entering into, maintaining, or giving effect to any provision with Entin which (1) includes a discriminatory exclusive hiring hall, (2) allows Respondent to demand more of employees than the payment of initiation fees and periodic dues uniformly required as a condition of acquiring or retaining membership, (3) provides for a closed shop, or (4) requires employees to seek union membership irrespective of the 30-day statutory grace period.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its office, and at the office of Entin, if Entin is willing, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that copies of said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[6] The New York supreme court order attached to the General Counsel's complaint as proof that Respondent attempted to enforce in state court the parties' agreement settling the matter set for arbitration directs Entin, *inter alia*, to discharge all of his employees who are not members in good standing with Respondent. The state court order is inconsistent with the Board's Order, *infra*, and it is preempted by this Decision and Order. See *Gibbons* v. *Odgen*, 22 U.S. (9 Wheat) 1 (1824); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT cause or attempt to cause Harvey Entin, d/b/a Oz Liquor Co., to discriminate against his employees because they are not members of the Wine and Liquor Store Employees Union, Local 122, affiliated with Distillery, Rectifying Wine & Allied Workers International Union of America, AFL-CIO.

WE WILL NOT maintain or give effect to the hiring hall and union-security clause of our collective-bargaining agreement with Harvey Entin, d/b/a Oz Liquor Co.

WE WILL NOT require employees at Harvey Entin, d/b/a Oz Liquor Co., to be union members in order to obtain or keep their jobs.

WE WILL NOT enter into, maintain, or give effect to a union-security clause with Entin which (1) includes a discriminatory exclusive hiring hall, (2) allows us to demand more of employees than the payment of initiation fees and periodic dues uniformly required as a condition of acquiring or retaining membership, (3) provides for a closed shop, or (4) requires employees to seek union membership irrespective of the 30-day statutory grace period.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WINE AND LIQUOR STORE EMPLOYEES UNION, LOCAL 122, AFFILIATED WITH DISTILLERY, RECTIFYING & ALLIED WORKERS INTERNATIONAL UNION OF AMERICA, AFL–CIO